



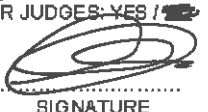
IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT RANDBURG

CASE NO: LCC 143/2015

Before: Ngcukaitobi AJ

Heard on: 23 April 2019

Delivered on: 09 May 2019

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO	(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED: YES / NO	
9/5/2019 DATE	 SIGNATURE

In the matter between:

MARKOS SIBANYONI

Applicant

and

MICHAEL HARTMAN HOLTZHAUSEN

First Respondent

CORNELIA ARNOLDINA HOLTZHAUSEN

Second Respondent

CARL JACOBS

Third Respondent

JUDGMENT

NGCUKAITOBI AJ:

INTRODUCTION

1. In the notice of motion issued on 7 August 2015 the applicant has cited the first and second respondent asking for an order directing them to return his “cows” and an interdict against the alleged verbal abuse by the respondents and an order allowing him access to electricity. That relief is opposed by the first and second respondents.
2. The opposition is three-fold. First, it is pointed out that the notice of motion is vague and unenforceable, second the respondents denied that they were responsible for the disappearance of the livestock, and thirdly it is alleged that the allegations of abuse and installation of electricity are too vague.
3. On 21 August 2018 the applicant filed a supplementary affidavit.
 - 3.1 In the supplementary affidavit the applicant asked for leave to join the third respondent, Carl Jacobs (“Jacobs”) because he “*played a role in the disappearance of my cattle.*” Jacobs is the son in law of the first respondent.
 - 3.2 Concerning jurisdiction, the applicant alleged that this court has jurisdiction on the grounds of the Extension of Security Tenure Act 62 of 1997 (“ESTA”). By so alleging, he means that he is an “*occupier*” as defined. He also alleged that he does not have the proper knowledge of the full names of the people

responsible for the operation of the farm hence their names were spelt wringly in the original notice of motion.

3.3 Finally, the import of the supplementary affidavit is to introduce an alternative player for financial compensation *“in case it becomes impossible to bring ... back my cattle or if they cannot be traced.”*.

4. In this judgment, I shall first deal with the issue of the amendment to the notice of motion. Then, I shall deal with the jurisdiction of the court. Thirdly I shall deal with the merits of the claim and finally the appropriate relief to be granted.

JOINDER OF CARL JACOBS

5. When the proceedings were instituted, the names of the first and second respondents were incorrectly spelt. The first respondent was called “Michael Oostdyzen” while the name of the second respondent was spelt “Unnah Oostdyzen”. In the answering affidavit although the first respondent spelt his own name correctly in the body of the affidavit, he did not correct the heading of the pleadings. The same in relation to the second respondent. Part of the explanation for the filing of the supplementary affidavit is to correct both the citation and the reference to the third respondent. The third respondent has now been introduced by the applicant as Jacobs, for the role that he allegedly played in the alleged disappearance of the cattle of the applicant.
6. Rule 12 of the Rules of this Court deals with joinder of parties and causes of action. Rule 12(1) provides that any number of persons, each of whom has a

claim (whether jointly, jointly and severally, separately or in the alternative) may join as plaintiffs or applicants in a case against the same person if their claims relate to substantially the same question of law or fact. Rule 12(5) states that the court may at any time upon application by any party or of its own accord, order that a person be joined as a party in the case.

7. It is therefore within the discretion of this court to order that a party should be joined in the proceedings. The supplementary affidavit was served some months ago. No new facts have been introduced by Jacobs, or the first and second respondents. In fact the role of Jacobs is fully explained by the first and second respondents' answering affidavits. It is clear that the joinder of the third respondent is justified, and I shall allow it.
8. The determination of the claims against the third respondent depends on the same cause of action against the first and the second respondents. Moreover, the applicant has explained that he is not fully aware of all the parties that played a role in the alleged disappearance of his cattle. The joinder, moreover, will not cause any prejudice to the respondents, including Jacobs. The supplementary affidavit in which Jacobs was joined was served in August 2018. A substantial period of time has elapsed since the delivery of this affidavit and no formal objection has been taken. To complain that the document which was served is not called "application for joinder" but is a "supplementary affidavit" in which Jacobs is joined unduly places form above substance. I shall therefore allow the application to join Jacobs as a party.

9. The applicant also asks for an amendment of the notice of motion. Amendments are regulated by Rule 22 of the Rules of this court. In terms of this Rule, any party may by notice to the other party indicate its intention to amend any document submitted to this court. The party receiving a notice of intention to amend may object, setting out the ground for its objection. The amendment in this instance pertains to the introduction of an alternative prayer to the effect that if the cattle cannot be returned, there should be an order of financial compensation. Again, the intention to amend was indicated as early as August 2018. Although an objection was raised in argument, no formal objection was raised. In any event, no prejudice has been suffered. It is in the interest of justice and a fair adjudication of this dispute that the amendment should be granted. As such, the amendment is allowed.

JURISDICTION

10. Jurisdiction is an anterior question. Usually, it is resolved before the merits of the claim are entertained.¹
11. Not only should jurisdiction preferably be decided upfront, it must be decided by reference to the pleadings. That is not to be conflated with the substantive merits of the case.
12. In motion proceedings, reference would ordinarily be had to the notice of motion and the contents of the supporting affidavits. These “*must be interpreted to*

¹ *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA) at para 33.

establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognisable only in another court."²

13. I have already alluded to the principle that jurisdiction should ordinarily be decided upfront. Moreover, as held in *Makhanya v University of Zululand*,³ in the case of a specialist court set up in accordance with a particular legislation, the precise terms of that legislation must be assessed to determine whether or not the facts pleaded by the applicant are sufficient to bring the claim within the parameters of the statute.
14. In the present matter, the pleadings must at least allege that the Court has jurisdiction over the parties ("personal jurisdiction"). There should be facts indicating that the applicant falls within the class of persons covered by the statute. Secondly, it should be alleged that there is jurisdiction over the subject matter or cause of action before Court ("subject matter jurisdiction").
15. With regard to personal jurisdiction, the applicant alleged that he resides at portion 3 of the farm Degoodedhoop 262 JT Belfast Mpumalanga Province. He has been living on the farm since 1988 with his parents. His father, who had been an employee of the farm owners, died in November 2002. The applicant's father, it is alleged, was a long-term occupier and a labour tenant at the farm. The applicant's

² *Gcaba v Minister for Safety and Security and others* 2010 (1) SA 238 (CC) at para 75.

³ *Makhanya* n1 above at para 25.

mother died on 16 June 2009 where after they were allocated grazing rights in a portion situated next to the household.

16. As for their part, the respondents alleged that the applicant resides on portion 3 Degoedewater, not Degoedehoop, and had resided there since he was a child with his parents. They claim that he never had any permission to reside on the farm in his own right as an adult. They admitted that the applicant's father had died while an employee of the second respondent residing at portion 3 Goodewater.
17. There is a dispute about whether or not the applicant's father was a labour tenant or a long-term occupier within the meaning of section 8(4) of ESTA. These disputes notwithstanding, in my view, the applicant qualifies as an "*occupier*" as defined. He is a "*person residing on land which belongs to another person and who has on 4 February 1997 or thereafter had consent or another right in law to do so*". For my purposes, it is sufficient that the applicant's father had consent to live on the property. Although it is alleged that the applicant never obtained consent in his own right, the fact is that his residence at the property has not been terminated in any manner whatsoever. Tacit consent is sufficient. The facts show that the respondents allowed the applicant to continue residing at the farm even after the death of his father in 2002. By allowing him to continue residing at the farm, the respondents tacitly consented to his residing at the farm.⁴ I am satisfied that the first element of jurisdiction is established.

⁴ See sections 3(3) and 3(4) of ESTA on the meaning of consent.

18. The second question relates to whether or not the cause of action is within the category of matters which can be adjudicated by this court. Jurisdiction has been disputed by the respondents on the grounds that the applicant's claim is a common law claim akin to a spoliation. It is then alleged that the case should have been brought before the High Court. But, it is not for me to decide whether or not the case would be successful if it had been brought as a spoliation under the common law before the High Court. My function is a narrower one. It is to consider whether or not the cause of action is cognizable in terms of ESTA before the Land Claims Court. I have already established that the applicant qualifies as an occupier. What he seeks is a return of his cattle that he alleges were illegally impounded by the respondents. For purposes of jurisdiction I do not have to concern myself with whether or not the claim is good or bad in law. I simply have to decide whether it falls within the competency of this court.
19. Section 7 of ESTA is relevant. It deals with the rights and duties of land owners. It provides that the owner or person in charge of land may have a trespassing animal under the control of an occupier impounded and removed to a pound in accordance with the provisions of any applicable law, if the owner or person in charge has given the occupier at least 72 hours' notice to remove the animal from the place where it is trespassing and the occupier has failed to do so.
20. Plainly, the legislature contemplated that certain disputes concerning trespassing cattle and their impounding would fall within the parameters of the Act. This is not surprising at all. After all, ESTA is a social legislation intended to govern the

relationship between owners of farms and occupiers in farms. It would be odd if a legislation of that kind would not anticipate disputes arising pertaining to the trespassing of cattle, their impoundment and indeed the consequences of the illegal impounding of cattle. In provinces such as Mpumalanga, KwazuluNatal and Eastern Cape, cattle are at the heart of the relationship between land owners and land occupiers especially labour tenants. Although the land tends to be demarcated, those demarcations only makes sense to the owners and occupiers, not the cattle. It is to be expected that cattle would trespass for reasons of access to water or better grazing lands.

21. The manner in which that relationship has been regulated is through section 7. Its constituent elements are significant. First, it accepts the probability of trespassing by cattle. Second, when cattle trespass, the Act does not give the owner *carte blanche* authority to impound the cattle. Thirdly, it entitles the occupier who is responsible for the cattle a procedural entitlement of notice before the act of impounding. Fourth, it imposes a duty on the land owner to give notice before impounding. During that period of notice, the land owner is under a duty to ensure that the cattle do not do any further damage on he farm.
22. As such, it is clear that there is ample substantive basis for the exercise of this court's jurisdiction to resolve the dispute. I accordingly find that the dispute is within the jurisdiction of this court. I shall now consider the merits of the case.
23. First, I deal with the constitutional basis for ESTA.

APPLICATION OF THE EXTENSION OF SECURITY OF TENURE ACT

General interpretative duty imposed by section 39 of the Constitution

24. Counsel for the respondent urged me not to apply the provisions of ESTA in assessing the lawfulness of the impounding and the entitlement of the applicant to use the land for grazing his cattle. I do not accept this proposition. I think ESTA must be construed purposively in light of section 25 of the Constitution. I shall commence my analysis with the place of the Constitution in the uses of land.
25. The Extension of Security of Tenure Act gives effect to section 25(6) of the Constitution, which in turn states that a person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an act of Parliament, either to tenure which is legally secure or to comparable redress.
26. Since ESTA is intended to give effect to a constitutional right, it must be interpreted to meet its objects. Section 39(2) of the Constitution imposes an obligation on this court “*when interpreting any legislation*” to “*promote the spirit, purport and objects of the Bill of Rights*”.
27. The primary trigger for the application of section 39(2) of the Constitution is whether the provision in question implicates or affects a right in the Bill of Rights. In those instances, there is a duty to apply section 39(2). This obligation is

discussed in various cases of our appeal courts. In *Fraser v ABSA Bank Limited*⁵ Froneman J described the import of section 39(2) as establishing “a mandatory constitutional cannon of statutory interpretation”.⁶ Therefore, “courts must at all times bear in mind the provisions of section 39(2) when interpreting legislation.”⁷

28. The present matter implicates a right in the Bill of Rights in two ways. First, the applicant has the right not to be arbitrarily deprived of property in terms of section 25(1). Secondly, ESTA is intended to give effect to the right to security of tenure contained in section 25(6) of the Constitution. Therefore, section 39(2) of the Constitution must be applied.
29. What does this mean then? A primary judicial function when construing legislation is set out in *Investigating Directorate: Serious Economic Offences v Heinley Motor Distributors (Pty) Ltd: in re Hyundai Motor Distributors (Pty) Ltd v Smit NO*,⁸ which holds that judges must avoid judicial interpretations which derogate from the Constitution:

“Judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section.”

30. Yet, there are also instances where statutory provisions are at face value constitutionally neutral. Here the obligation of a court as expressed in *Wary*

⁵ 2007 (3) SA 484 (CC).

⁶ *Fraser* supra at para 43.

⁷ *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) at para 88.

⁸ 2001 (1) SA 545 (CC) at paras 22 to 23.

*Holdings (Pty) Ltd v Stalwo (Pty) Ltd & Another*⁹ is to prefer a meaning that would better promote the spirit, purport and objects of the Bill of Rights.

31. The obligation to adopt an interpretation which would better promote the Constitution must also be seen in light of another related duty, namely, to give land occupiers “*the fullest possible protection of their constitutional guarantees*”.¹⁰ This applies more so in land related legislation where redress is paramount:

*“In searching for the purpose, it is legitimate to seek to identify the mischief sought to be remedied. In part, that is why it is helpful, where appropriate, to pay due attention to the social and historical background of the legislation. We must understand the provision within the context of the grid, if any, of related provisions and of the statute as a whole including its underlying values.”*¹¹

Role of section 25 of the Constitution when interpreting ESTA

32. I have noted that section 39(2) of the Constitution mandates this court to interpret ESTA through the lens of the constitution. The most pivotal constitutional provision in this respect is section 25, which I shall now consider.
33. It has been stated that the Constitution is “*transformative*”. This transformation of society through the Bill of Rights takes place on a range of levels. One of the most important is the transformation of property relations, particularly land. The most obvious area of transformation is land ownership and the rights of persons

⁹ 2009 (1) SA 337 (CC).

¹⁰ *Department of Land Affairs & Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) at para 53.

¹¹ *Goedgelen* supra at para 53.

living on land, which is provided for in section 25. Security of tenure sits alongside land ownership in section 25.

34. The primary purpose behind section 25 is to transform property ownership patterns from the colonial and apartheid past to a future based on equality, dignity and freedom. Land ownership, however, is not the whole story. The manner in which the rights of occupiers – who have no rights of ownership – are regulated is an important function of section 25.
35. I must construe section 25 and any legislation passed to give effect to it to redress the history of apartheid and colonial dispossession. That history, as pithily explained by Froneman J in *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape and others*,¹² is based on “*dispossession and the transfer of land and property to the colonizers accompanied by an economic system that sustained the dispossession.*”¹³
36. Moreover, as noted in *Daniels v Scribante & Another*¹⁴ “*dispossession of land was central to colonialism and apartheid.*”¹⁵ Dispossession of land “*first took place through the barrel of the gun.*”¹⁶ When the wars of dispossession ended, law begun, as a series of laws were passed to entrench white hegemonic rule.

¹² 2015 (6) SA 125 (CC).

¹³ *Shoprite Checkers* supra at para 34.

¹⁴ 2017 (4) SA 341 (CC).

¹⁵ *Daniels* supra at para 14.

¹⁶ *Daniels* supra at para 14.

37. It is now the constitutional function of courts to construe any law to undo the legacies of dispossession. The manner in which the land is distributed is a graphic representation of the racialized dispossession of land. Because of the centrality of land dispossession to South Africa's story, section 25 is the primary instrument for the transformation of land rights. Thus, in *Agri SA v Minister for Minerals & Energy*¹⁷ the Constitutional Court held that section 25 must be interpreted to reverse the "*gross inequality in relation to wealth and land redistribution in this country.*"¹⁸ Private property rights of the racial groups that were privileged under apartheid are not the focus of section 25. Quite the contrary. It is the transformation of those relations that is the focus of the section. That transformation, in turn, aims at protecting and advancing the property interests of the previously dispossessed.
38. Hence section 25 imposes the duty on the State to adopt measures, legislative and otherwise to transform the colonial and apartheid property relations to property relations informed by the respect of equality, dignity and freedom. There can be no doubt that the current property relations, inherited from colonialism and apartheid are a significant constraint to the achievement of the society premised on equality, dignity and freedom – the foundational values in the Constitution.
39. There is, therefore, a duty to undo the existing patterns of property relations and consistently to strive towards a land dispensation that is informed by the dignity,

¹⁷ 2013 (4) SA 1 (CC).

¹⁸ *Agri SA* supra at para 61.

equality and freedom the primary interests being the interests of the previously dispossessed.

40. The instrumentality of section 25 as a vehicle for the transformation of property relations is apparent from its structure. It contains two primary components. The first category includes the rights not to be deprived of property in an arbitrary fashion, without a statutory basis and without recourse to law; the right to be treated in a just and equitable fashion when the State expropriates private property for public purposes and in the public interest; and the right to insist that in the event of a disagreement about modes of deprivation of property such as expropriation, such disagreements must be adjudicated by courts.¹⁹
41. The second component section 25, which is implicated in this case can be regarded as the positive aspects of the right. These aspects, as was held in *Haffeejee NO & Others v Ethekwini Municipality & Others*²⁰ focus on “*the need for redress and transformation of the legacy of grossly unequal distribution of land in this country*”.²¹ They include the commitment of the State to land reform and to equitable access to land and all of South Africa’s natural resources. Moreover, they create rights to security of tenure in land and the right to the restitution for land dispossessed after 19 June 1913 – the date when the Native Land Act 27 of 1913 came into operation.

¹⁹ See sections 25(1),(2) and (3). Although these rights can be viewed as negative property rights, they also contain positive elements.

²⁰ 2011 (6) SA 134 (CC).

²¹ *Haffeejee* supra at para 30.

42. Both components of the rights in property protected by section 25 are implicated in a case of the compulsory taking of cattle by impoundment as this case presents. It must be emphasized that the deprivation of cattle amounts to deprivation of property, which the law proscribes, where it is arbitrary. Section 25 also plays another important transformative role, which is to affirm the property rights of African people. Under colonialism and apartheid, it will be recalled, the rights of Africans to hold property, including ownership of cattle and land were severely curtailed by arbitrary laws. It is an important purpose of section 25 that those rights will be affirmed and may not be arbitrarily interfered with.

The mischief behind section 25

43. So far, I have spoken about land. But this case is also about cattle. Cattle are part and parcel of the story of dispossession, the mischief which is intended to be redressed by section 25 of the Constitution. Cattle represented wealth of African people before colonial conquest. This remains so even to date. Virtually all the colonial wars fought between European conquerors and the indigenous native people of South Africa were characterized by cattle dispossession.²²
44. Once the wars of conquest were over, particularly at the end of the 19th century, a series of laws were passed to entrench land dispossession, cattle dispossession and segregated areas of social and economic settlement. One of these statutes was the Glen Grey Act of 1896. This was introduced by the Prime Minister of the Cape

²² For the cattle dispossession in the wars that took place in South Africa's Eastern frontier see Noel Mostert *Frontiers: The Epic of South Africa's Creation and the Tragedy of the Xhosa People* (PIMLICO: 1992).

Colony, at the time Cecil John Rhodes, who explained its purpose in a speech given to the Cape House Parliament on 30 July 1894:

"Then there arises the question of [the Native Land], which cannot continue to provide enough for all of the [Natives]. There is not room for them all. ... We do not teach [the natives] the dignity of labour, and they simply loaf about in sloth and laziness. They never go out and work."

45. Rhodes also explained that the point of the Act is to give powers to the government to restrict land which could be occupied by Africans. In this regard, village management boards appointed by the government would be introduced. In addition to having the powers to allocate and arbitrarily reduce the land, these government boards *"would limit the amount of stock on each agricultural lot, and therefore overcrowding would be prevented."*
46. It is now history that the Glen Grey Act came into operation, producing untold suffering to the African people of the Eastern Cape. Its primary object was to restrict the amount of land that could be allocated to Africans. Moreover, it gave the Government sweeping powers to reduce the amount of stock that could be kept by Africans. The consequences of keeping stock in excess of their allocation by Government appointed boards were severe. Cattle could be impounded, sold and the owners would be punished, sometimes through criminal sanctions.

47. The structure of the Glen Grey Act would later be replicated in the Native Land Act.²³ In its opening section, the Native Land Act prohibited the ownership of land by African people without the permission of the Government. In the areas allocated for Native settlement, the extent of the land that could be occupied by Natives was itself severely curtailed.
48. The social and economic consequences of the legislation, whose application was wide and across the newly established Union of South Africa was to force prosperous African farmers into White owned farms and to compel them to work as wage labourers.
49. The apartheid state did not relent. In the 1950s, it introduced “*betterment schemes*” in African areas that were known as “*native reserves*”. The Native Administration Act 38 of 1927 provided the Governor-General with sweeping powers to control lives of Africans, including their political systems; their economic structure; and their social systems. It was under this law that the betterment schemes were introduced. One of these, which was passed in 1949, granted the Minister of Native Affairs the power to “*declare a land unit a betterment area and thereupon – any rights which any person occupying land within that area may have to graze stock... shall cease...*”.²⁴ While the ostensible basis for these schemes was the improvement of lives of Africans, in reality, like

²³ See the discussion of the relationship between the Glen Grey Act and the Native Land Act in Tembeka Ngcukaitobi *The Land is Ours: South Africa's First Black Lawyers and the Birth of Constitutionalism* (Penguin: 2018) pp 218-219.

²⁴ Proclamation No. 116 GG 2610 13 May 1949 (4) (i) and (ii)

the Glen Grey Act and the Native Land Act, the schemes wreaked havoc in the lives of stock owners, resulting in reduction of land, compelling Africans in the “*native reserves*” to sell or slaughter their cattle.

50. Therefore, the introduction of laws that restricted and curtailed land ownership had a profoundly disruptive effect on generation and retention of African wealth. Laws regulating cattle movement including by the draconian measure of impoundment are part and parcel of that long history of land dispossession.²⁵ I should apply ESTA to redress that history, not to further entrench it. That is not to suggest that land owners have no rights. The point is that transformative constitutionalism requires an appropriate balance to be struck with the interests of land occupiers.
51. The transformative nature of the Constitution cannot be realized without the recognition that cattle impounding laws exist in a larger context of cattle dispossession. When a court construes a law that permits and regulates the dispossession of cattle in farms, it must do so with a clear historical context. As noted above, a court is duty bound to pursue an interpretation of the law that gives the fullest possible constitutional protection to holders of constitutional rights.
52. In its preamble, ESTA proclaims that it intends to provide for measures “*to facilitate long term security of land tenure, to regulate the conditions of residence on certain land*”. It also aims to “*extend the rights of occupiers, while giving due recognition to the rights, duties and legitimate interest of owners*”.

²⁵ See *Zondi v MEC for Traditional & Local Government Affairs* 2005 (3) SA 589 (CC).

53. Section 5 of ESTA codifies the fundamental rights of occupiers and owners. These include the rights to human dignity; freedom and security of the person; privacy; and freedom of movement.
54. During argument, there was a debate as to whether or not the applicant has any statutory rights to keep cattle at the farm. I think the answer to this is to be found in at least three provisions of ESTA.
55. First, as mentioned above, section 5 includes the rights of occupiers to dignity. In relation to farm dwellers, dignity cannot be restricted to personal dignity. It must include the entitlement to a dignified standard of living despite the meagre and sometimes pitiful resources at their disposal. Farm occupiers are entitled, as a matter of dignity to have their assets, such as cattle, protected by law against forcible taking as happened here. The statutory rights in section 5 of ESTA must be construed consistently with the right contained in section 25(1) of the Constitution not to be arbitrarily deprived of property. Cattle are property. Under the Constitution farm occupiers may not be arbitrarily disposed of their cattle.
56. Secondly, section 6 of ESTA provides for the rights and duties of occupiers. Section 6(1) states that *"an occupier shall have the rights to reside on and use the land on which he or she resided and which he or she used on or after 4 February 1997, and to have access to such services as had been agreed upon with the owner or person in charge, whether expressly or tacitly"*. ESTA prohibits conduct by either the owner or the occupier, which has the effect of frustrating the exercise of the rights in question. The rights of an occupier to keep cattle at a farm

may, in certain circumstances, constitute a “*service*” agreed upon with the farm owner. Unless this is withdrawn in a lawfully recognized manner, a farm occupier is entitled to keep cattle on a farm. Moreover, the section speaks of the right to “*use the land*”. Where an occupier keeps cattle as part of an agreement with the owner, the right to use the land includes the right to graze one’s cattle.

57. Thirdly, the provisions of section 7(1) presuppose the existence of animals on farms, which may belong to or under the control of an occupier. It refers to “*trespassing animals usually or in the care of an occupier*”. This wording, in my view shows that it is within the contemplation of the legislature that farm occupiers will keep animals, including cattle, on farms. Otherwise there would be no purpose in regulating the rights of owners in trespassing contexts.

APPLICATION OF LEGAL PRINCIPLES TO THE FACTS

The facts of the impoundment

58. I can now focus on the facts.
59. The applicant is employed as a general worker by one Peter Jorch. He resides at portion 3 of the farm De Goedehoop 362 JT Belfast, Mpumalanga. I have already concluded that the applicant qualifies as an ESTA occupier. According to the applicant the first respondent is “*a son-in-law of the farm owner*” where he resides.

60. The applicant has resided on the farm since 1988. His father died in November 2002. The applicant's father was employed as a farmworker by the respondents. The applicant's mother died in June 2009. According to the applicant, subsequent to the passing of his mother they were allocated grazing rights in a portion of land situated next to their household by the respondents.
61. When the applicant's mother died, they had 6 cows. In November 2014 these cows – also referred to as "*livestock*" in the founding affidavit – were impounded by the farm owner "*without our consent and no production of either a writ of execution for attachment and/or legal document*". When the applicant went to fetch the livestock, he was threatened with eviction and informed that he was not allowed to keep livestock at the farm.
62. The applicant also alleged that on several occasions the respondents passed inappropriate verbal remarks towards him and his family and the first respondent had threatened to evict him if he continued to ask about the livestock. At a certain point in time, the applicant alleged that he applied for installation of electricity with the municipality but was informed that the permission of the landowner would be required. The respondents, however refused to furnish the necessary permit.
63. According to the answering affidavit, the first respondent resides at portion 3 of the farm De Goedehoop 362 Registration Division JT in the Province of Mpumalanga. He is married to the second respondent, Juna Cornelia Arnoldina Holtzhausen, who is the owner of portion 3 of De Goedehoop and portion 3 of the

farm Goedewater 359, Registration Division JT Province of Mpumalanga – this is where the applicant resides. Although he denied that the applicant had been granted grazing rights or the rights to keep livestock, he did not deny that as a matter of fact the applicant kept livestock at the farm.

64. Specifically, the first respondent stated that nobody except for the company that owned the farm “lawfully” kept livestock on the property after the death of the applicant’s mother. He denied that the applicant lawfully kept livestock.
65. The first respondent admitted impounding the cattle. They alleged that during November 2014:

“[My] son-in-law suddenly one day saw cattle on portion 3 R De Goedehoop which did not belong there. He initially thought that the cattle belonged to a neighbor whose cattle previously trespassed on the property and he phoned the neighbor to request that the cattle be removed.”.

66. As the applicant had alleged, 6 cattle were impounded. These are described in the answering affidavit as one black bull, one black bull calf, one black cow with white stomach, one red brown cow, one black heifer calf and one black cow. Although on the papers there is an issue taken as to whether the applicant was correct in describing the cattle as “cows” that issue was not seriously pursued in argument. It is clear, in my view that the references to the “cows” or “livestock” in the founding affidavit is the same as to the “cattle” in the answering affidavit.
67. The manner of the impoundment described by the applicant is the same as that admitted by the respondents. The applicant claimed that the cattle were

impounded by the "*son-in-law*" of the owner of the farm, whom he inaccurately referred to as the first respondent. The first respondent does not deny that the cattle were impounded by his son in law. The son in law is Jacobs.

68. According to the respondents, that same afternoon in November 2014 the applicant went to the house of Jacobs to inform him that the cattle belongs to him. The applicant asserted, that he had the right to graze the cattle on the farm which was denied by Jacobs.
69. The cattle were not released. Jacobs apparently obtained the advice of the South African Police Service and the Pound Master in Belfast, the nature of which is unclear.
70. Notice was then given to the applicant to remove the cattle by 11 November 2014, failing which they would be impounded. According to a document marked "MH3", annexed to the answering affidavit, Jacobs recorded that the applicant had no permission to keep cattle in the farm and gave him until 11 November 2014 to remove the cattle. A handwritten inscription by one Isaac on the same document says that the applicant refused to sign. For his part, the applicant denied that he received the document. There is no affidavit confirming how the notice was given to the applicant.
71. It is apparent that the circumstances in which the cattle were impounded were fraught, characterized by compulsion and disagreement. A slip annexed as "MH4" to the answering affidavit dated 14 November 2014 records that the cattle

were taken from the farm Degoedehoop, with the contact person being “Carl Jacobs”.

72. On 14 November 2014 the cattle were impounded to the control of the Pound Master of Belfast. It is alleged that they were sold 21 days later. In the answering papers, the respondents stated that they did not know where the cattle were. Neither does Jacobs. As such no one is able to deliver the cattle to the applicant.
73. The respondents alleged that when Jacobs gave notice to the applicant and had the cattle impounded, he acted for and on behalf of the company and not in his personal capacity or on behalf of the respondents. There is, however, no evidence that this was so. The notice given by Jacobs to the applicant does not record that they were provided on behalf of the company. Nor does the notice from the Pound Master dated 14 November 2014. There is simply no evidence that at the time of the impounding, Jacobs had been mandated by the company to do so. I cannot, without more, accept that the act of impounding constituted the actions of the company and not the respondents. Under ESTA, the responsibility to follow proper and fair procedures when impounding cattle is placed on “*persons in charge*” and owners. Ownership of the land thus, is not decisive.
74. It is also clear that at all material times the applicant dealt with the respondents and Jacobs directly. Finally, it is notable from the provisions of section 7 of ESTA, the actions in questions do not have to be those of the owner. As such, it is legislatively irrelevant that the respondents are not owners of the farm, but the company is. It has ever been denied that they were for all intents and purposes,

"persons in charge" of the farm. I find that the respondents and Jacobs were persons in charge of the farm. As persons in charge of the farm they bore the constitutional and legislative obligations when impounding cattle from the farm.

75. In the replying affidavit, the applicant clarified the legal basis for his claim. He submitted:

"The cattle were impounded without following a proper procedure to do so by the respondent as no court order was produced to me giving the respondent any rights to impound my father's cattle except for the force they used to overpower me whilst they herded my father's cattle hence I refer to such impound as illegal."

76. Accordingly, the basis for the illegality was two-fold: absence of notice and absence of a court order.

77. I must consider the first issue, namely notice in terms of ESTA.

Absence of notice

78. Section 7(1) of ESTA provides:

"The owner or person in charge may have a trespassing animal usually or actually in the care of an occupier impounded and removed to a pound in accordance with the provisions of any applicable law, if the owner or person in charge has given the occupier at least 72 hours' notice to remove the animal from the place where it is trespassing and the occupier has failed to do so: Provided that the owner or person in charge may take reasonable steps to prevent the animal from causing damage during those 72 hours."

79. On the papers it is plain that 72 hours' notice was not given as contemplated in section 7 of ESTA. It was alleged that the applicant was instructed to remove his cattle simultaneous with the impoundment. Furthermore, the applicant refused to

sign the document which was allegedly given to him. The applicant denied that any notice was given.

80. I canvased this issue with counsel for the respondents. He accepted that section 7 of ESTA was not complied with. He stated that the respondents did not rely on compliance with ESTA in their defence. Rather they place reliance on the provisions of the Pound Ordinance No 13 of 1972 applicable in the area of the former Transvaal and which continues to be in force in the Mpumalanga Province. As submitted in the heads of argument on behalf of the respondent the landowner has no discretion with regard to the impoundment of trespassing animals to his land. He/she is compelled to have the animals impounded and failure to do so is a criminal offence.
81. The question that arises therefore is how I should approach the act of impounding, which is admitted on the papers, but justified on the basis of the Ordinance. This calls for interpretation. ESTA flows directly from section 25(6) of the Constitution and intends to give effect to it.
82. The rights of people living in farms to keep their cattle is one of the rights provided for by section 6 of ESTA as a "*service*" agreed upon with the owner or person in charge either expressly or tacitly. The right to keep cattle on the farm was, on the common cause facts, tacitly agreed upon. It is common cause that the applicant has lived on the farm for all of his life. His father was employed by the owners of the farm until he died in 2002. During that period the applicant and his parents were entitled to keep cattle on the farm. Between 2002 and 2009 it is

common cause that cattle belonging to the applicant were kept on the farm. The applicant's mother died in 2009.

83. The applicant has asserted not only the right to keep the cattle, but grazing rights. The denial of the respondent is also couched in careful terms simply asserting that no right was given to keep the cattle or to graze them. But it seems to me that it would have been a simple matter to terminate such rights, if the respondents wanted to do so. I must therefore accept that at the very least, tacitly, the applicant was given the right to keep and graze cattle on the farm.
84. In my view, the rights of people living on farms do, where applicable, include the rights to keep cattle. That right, is legislatively provided for. It cannot be arbitrarily interfered with, since at any rate section 7 of ESTA deals with the correct procedure of impoundment.
85. Since I am concerned with the interpretation of a statute that is intended to give effect to a constitutional right, I am obliged by virtue of section 39(2) to adopt an interpretation that would give the fullest expression to the rights of the applicant.
86. The respondents' suggestion, in essence, is that I should not apply the provisions of ESTA, and only apply the Pound Ordinance. Adopting this approach, would necessarily mean the nullification of the statutory protections provided for in ESTA. It would mean preferring a statute that is pre-constitutional over a post constitutional statute to the extent that they regulate the same subject matter.

87. Yet there is a principle of law recently adopted and approved by the Supreme Court of Appeal in *Minister of Justice & Constitutional Development & Others v Southern African Litigation Centre & Others*²⁶ where the court stated: “[i]f this last Act professes, or manifestly intends to regulate the whole subject to which it relates, it necessarily supercedes and repeals all former acts, so far as it differs from them in its prescriptions.”²⁷
88. This would mean that the requirement of notice under section 7, introduced under the Constitution must apply because it is a recent statute.
89. But, in my view there is another more cogent reason why the approach of the respondents must be rejected. I have already stated that on the pleadings, the applicant complained of two defects with the procedure for impoundment.
90. The first defect concerns lack of notice. It is so that he did not specifically plead that the legislative source of the notice is section 7 of ESTA. But I cannot criticize him for that. He has pleaded sufficient facts to ground his cause of action. He generally has no duty to plead the law.²⁸
91. The second complaint is the absence of a court order. Again that is sufficient fact to ground a cause of action. Whether or not notice and/or court order are required are legal conclusions. The only issue for determination is one of legal

²⁶ 2016 (3) SA 317 (SCA).

²⁷ *Minister of Justice & Constitutional Development* supra at para 102, quoting *Gorham v Lockett* 6 B Monroe (Ky) 146 (1845) at 154.

²⁸ *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W) at 902 1-J and 903 A-B, holding that only facts need to be pleaded, and not conclusions of law.

interpretation and application. I find that the provisions of the Ordinance are subject to ESTA. Regardless of the procedures contained in the Ordinance, ESTA must be complied with. The requirements for the 72 hours' notice in the event of impoundment are mandatory. Linguistically, at any rate, section 7(1) of ESTA does contemplate another law which will be applied alongside its provisions. Here, there was not notice, hence the impoundment is unlawful for non-compliance with ESTA.

Absence of court order

92. The Pound Ordinance makes no provision for notice. It also does not make provision for any judicial role. If I were to apply the Ordinance on its terms, it is plain that the outcome would be unconstitutional. I would breach the rights of the applicant to property in an arbitrary fashion, in conflict with section 25(1) of the Constitution.
93. Yet the constitutional duty requires me to adopt meanings to statute that are compatible with the Constitution. Therefore, I am of the view that section 7 of ESTA is mandatory whenever cattle are impounded. To the extent that the Ordinance continues to apply, it is subject to and subservient to the mandatory provisions of ESTA.
94. My judgment should not be understood as a constitutional striking down of the Pounds Ordinance. There is no constitutional challenge before me and I do not intend making constitutional findings based on the Ordinance. The full extent of

my judgment is to read the judgment in a manner that is compatible with ESTA and indeed compatible with section 25(6) of the Constitution.

95. It must be recalled that the Ordinance was passed in 1972, at the height of apartheid. Whereas the mere passage of a law during apartheid is not conclusive evidence of its unconstitutionality, its provisions strike one as being out of step with constitutional norms. First, its provisions are drastic. Section 18 imposes an obligation on the owner of land to send stock to the nearest pound by the shortest practical route. Section 18(7) of the Ordinance imposes criminal sanctions on the owner. It provides that any owner of land who contravenes or fails to comply with the provisions which include section 18(1) shall be guilty of an offence. Not only are such drastic measures disproportionate, they fail to take into account that an act of impoundment constitutes a grave infringement on property rights of land occupiers.
96. Section 24 of the Pound Ordinance provides for the sale of the impounded cattle within 21 days of the impoundment. In *Zondi*²⁹, Ngcobo J described the process of cattle impounding which was before the Court in these terms:

"The scheme permits the landowner to seize the livestock and cause it to be detained and sold by the poundkeeper. The sale is on conditions stipulated by the poundkeeper. The purpose of the sale is to secure payment of trespass fees or damages and other impoundment fees and expenses. The scheme denies the livestock owner the protection of the judicial process and supervision exercised by a court through its rules over the process of execution. From start to finish there is no judicial intervention."

²⁹ *Zondi* above n22 at para 74.

97. This procedure, said the Court, was unconstitutional because its effect is to *“remove from the court’s scrutiny one of the sharpest and most divisive conflicts of our society.”* Yet, cattle dispossession through acts such as impounding *“is a constant and bitter reminder of the process of colonial dispossession and exclusion.”*³⁰
98. The facts in this case are a perfect illustration of how disturbingly enduring some features of apartheid and colonial conquest have been. Years after constitutionalism, the colonial architecture of land dispossession remains. It is felt most acutely in the farms where the landless and the landed occupy the same land. It is the function of the Constitution to mitigate the effects of the asymmetry of power manifested in the present matter.
99. A proper balance between the interests of the land owners and the land occupiers is to be achieved by the installation of courts as arbiters of disputes of trespassing cattle. Without judicial intervention, the outcome would be self-help. The rule of law will be negated by the rule of the strong.
100. The Pound Ordinance does not envisage the involvement of courts between the act of impounding and the sale of the cattle. Thus, the applicant’s complaint that the sale of his cattle took place without a court order is perfectly understandable. But, nevertheless, my function is not to decide the constitutionality of the Ordinance, but to interpret the Ordinance in the light of the Constitution and ESTA.

³⁰ Zondi above n22 at para 76.

101. My conclusion therefore is that the impounding in this case is in breach of section 7 of ESTA. The provisions of the Ordinance are probably unconstitutional, but that issue is not before me. What remains, therefore, is the determination of appropriate relief.

CONCLUSION AND RELIEF

102. This court is established under section 22 of the Restitution of Land Rights Act 22 of 1994. It has all such powers in relation to matters falling within its jurisdiction as are possessed by a High Court having jurisdiction in civil proceedings. It also has all the ancillary powers necessary or reasonably incidental to the performance of its functions.
103. In terms of sections 38 and 172 of the Constitution courts are entitled to grant appropriate orders, which may include declaratory orders and may fashion remedies in ways that are just and equitable.
104. An appropriate relief, as held in *Hoffmann v South African*³¹ should contain these features:

“The determination of appropriate relief, therefore, calls for the balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first, to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third, to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief.”

³¹ 2001 (1) SA 1 (CC) at para 45.

105. The facts here show that it would not be fair to return the specific cattle that were impounded. The fact is that they have been sold. I do not know for how much they were sold. There is no evidence before me as to their market value at the time of the impoundment. Nor is there any evidence as to what compensation would be just and equitable in order to place the applicant in the position that he would have been in had it not been for the loss of the cattle as a result of what I have concluded was an unlawful impoundment. As such, on the evidence I am unable to make an order for compensation, whether monetary or otherwise as requested in the supplementary affidavit.
106. I believe that a declaratory order would be sufficient at this stage. If, and to the extent, that further evidence is led concerning the loss suffered by the applicant consequent upon the impoundment, compensatory relief may be considered. The relief as it relates to compensation will, accordingly, be postponed *sine die*.
107. In keeping with the established practice of this court to award costs only in exceptional circumstances, of which there are none here, I do not intend awarding costs.
108. In the circumstances, the following order is given:
1. It is declared that in impounding and/or facilitating the impoundment of the 6 cattle of the applicant described in paragraph 2 below, the respondents in their capacities as persons in charge of the farm did not comply with section 7 of ESTA.

2. The cattle referred to in paragraph 1 of this order are the following:
 - 2.1 one black bull;
 - 2.2 one black cow with white stomach;
 - 2.3 one black bull calf;
 - 2.4 one red brown cow;
 - 2.5 one black heifer calf; and
 - 2.6 one black cow.
3. The applicant is entitled to just and equitable compensation in respect of the loss of cattle, which must take into account the value of the cattle at the time of the impoundment in November 2014, and any other relevant factors.
4. The hearing as to compensation is postponed *sine die* to allow both parties to make further representations, including if necessary, by way of oral evidence as to the loss suffered by the applicant resulting from the impoundment of the cattle.
5. The Registrar is directed to enroll, for hearing, paragraph 3 and 4 of the order on a date to be arranged with the parties.
6. There is no order of costs.



TEMBEKA NGCUKAITOBI
ACTING JUDGE OF THE LAND CLAIMS COURT

APPEARANCES

For applicants: Adv. G. P Maluleke – *Instructed by Mthimunya Attorneys*

For Respondents: Adv. J. J Botha – *Instructed by Danie Van Der Walt attorneys*